

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1502

To be argued by
JAMES S. CARROLL, III

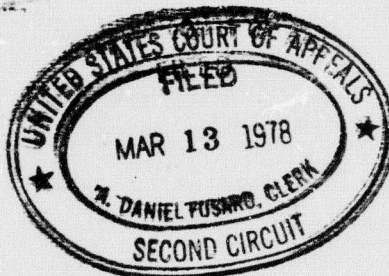
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 77-1502

: UNITED STATES OF AMERICA, :
: :
: Appellee, :
: :
: -against- :
: :
: CASPAR ALEXANDER YASPAR, :
: :
: Appellant. :
: :

BRIEF FOR APPELLANT



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COTTON FIBRE CENTRAL
BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Appellee,

-against-

Docket No. 77-8418

CASPAR ALEXANDER YASPAR,

Appellant.
-----X

BRIEF FOR THE APPELLANT

PRELIMINARY STATEMENT

Weston
Rose-Rita Bonds
This is an appeal by Appellant CASPAR ALEXANDER YASPAR from a judgment and sentence imposed on September 21, 1977 (Hon. Dudley Bonsal, D.J.) convicting him after jury verdict of guilty rendered on July 29, 1977 of violations of Title 18 U.S.C. sections 1341 and 1342.

The Appellant was charged under a four count indictment with using the mail to defraud the American Express Company by the use of three credit cards allegedly fraudulently obtained. At the close of the Government's case, the Court dismissed the Fourth Count of the indictment on the ground that the Government had not proved beyond a reasonable doubt that the mail was used in connection with the application for the credit card.

During the course of trial, the Court allowed witnesses to testify as to prior similar acts on the issue of intent pursuant to Rule 404 of the Federal Rules of Evidence. It is the propriety of the admission of this evidence by the Court which is in question on this appeal.

STATEMENT OF THE CASE

PHILLIP MORGAN was called as a witness by the Government.

He testified that he was employed by American Express as a supervisor in the legal outside agency unit. (Tr. p. 23). The unit handles all accounts that are referred for collection and he personally handles any account over \$10,000.00. (Tr. p. 23). Files and records are kept on all 8 million credit cards in circulation. (Tr. p. 24). The witness identified Government exhibits 1, 2 and 3 as American Express applications and testified that cards were subsequently issued based upon the applications. (Tr. p. 27).

Government's exhibit 1 is an American Express application in the name Chester H. Yasper with the address 1649 West Mentor Street, Philadelphia, Pa., social security number 580-148-904. Employment on the application was listed as Counsel, New York State SEenate, Legislative Office Building.

Government's Exhibit 2 is an American Express application in the name of C. Alex Yasper residing at 587 Broadway, Menands Apt. 12c, N.Y., N.Y. Employment on the application is listed as supervisor, New York State Senate, State Capitol, Albany, N.Y.

Government's Exhibit 3 is an American Express application in the name of C. Yasper living at 2160 Madison Ave., Apt. 10b, N.Y., N.Y. Position of employment is listed as presidential assistant, New York Medical College.

The unpaid balance on the account issued pursuant to Government's Exhibit 1 was \$11,726.46 (Tr. p. 37); with respect to Government's Exhibit 2 was \$11,256.12 (Tr. p. 37); and with respect to Government's Exhibit 3 was \$1,700.19 (Tr. p. 38).

At side bar, the Assistant U.S. Attorney indicated that he intended through the witness to introduce evidence as to other similar acts pursuant to Rule 404. Thereafter, Exhibits 26 through 31, American Express applications by Yasper were introduced into evidence (Tr. p. 53).

Government's Exhibit 26 is an American Express application in the name of Curtis Yasper, 330 W. 48 St., N.Y., N.Y. with a place of business as VI Tourist Board, 9 Rockefeller Plaza, N.Y., N.Y. dated March 19, 1970. (Tr. p. 53).

Government's Exhibit 27 is an application in the name of C. Charles Yasper, 401 Seventh Ave., N.Y., N.Y.,

Assistant Director, Virgin Islands Commercial Tourism dated March 3, 1971. (Tr. p. 55).

Government's Exhibit 28 is an application by Carlos C. Yasper, 330 W. 45 St., N.Y., N.Y., Director, Virgin Island Government office at 16 W. 49 St., New York, N.Y. dated March 24, 1971. (Tr. pp. 54-55).

Government's Exhibit 29 is an application by Carlos Yasper, 330 W. 45 St., N.Y., N.Y. employed by the Virgin Island government dated December 3, 1971. (Tr. p. 54).

Government's Exhibit 30 is an application by Clyde Americ Yasper, 330 W. 45 St., New York, N.Y. employed by Caribbean Travel Services, N.Y., N.Y. as a consultant dated December 2, 1971. (Tr. p. 54).

Government's Exhibit 31 is an application by Alex Yasper, 3880 Third Ave., Bronx, N.Y. employed by Ford Trust Company N.Y., N.Y. as an executive director dated September 1970. (Tr. p. 54).

On cross-examination, the witness testified that in none of the three applications (Gov'ts 1-3) was a name other than Yasper given and that employment was never falsified. (Tr. p. 80).

During redirect, a bench side conference was held with respect to the introduction of Government's Exhibit 32, a certified copy of judgment of conviction of the appellant for a prior violation of the mail fraud statute regarding

Government's Exhibit 28. (Tr. p. 95). A stipulation relating to the conviction was read into the record. (Tr. p. 96).

NOMIE BRODY was called as a witness for the Government.

The witness testified that she is employed as a rental agent for Village ONE Apartments, 587 Broadway, Menands, N.Y. (Tr. p. 105). Government's Exhibit 33, a lease in the name of Kenneth and Joyce French from September 1, 1975 to August 31, 1976 for apartment 12c, 587 Broadway, Menands, N.Y. was introduced into evidence. (Tr. p. 106). The witness checked her records and C. Alex Yasper was not residing at that address from September 1, 1975 to August 31, 1976. (Tr. p. 108).

DELORES WATKINS was called as a witness for the Government.

The witness testified that she lives at 1649 W. Mentor St., Philadelphia, Pa. and that she knew Casper Yasper. (Tr. p. 113). She testified that she had known the appellant for six or seven years and that she had resided at the above-stated address for about three years. (Tr. p. 114). During the year 1975, the appellant visited the witness periodically in Philadelphia and occasionally stayed overnight. (Tr. p. 115). During the six month period in 1975 that Mr. Yasper saw the witness, he would stay at her residence about three or four nights a week. (Tr. p. 116). The witness also received mail

from the American Express Company for the Appellant during that period of time. (Tr. p. 117). The mail would come addressed to Chester Yasper. (Tr. p. 117). Mail received at her address was forwarded to Mr. Yasper at New York Medical College. (Tr. p. 118). The witness testified that the statement in Government's Exhibit 1 that Mr. Yasper had resided at 1649 W. Mentor St. for 4½ years was not true. (Tr. p. 119).

RICHARD W. BREVOORT was called as a witness for the Government.

The witness testified that he was employed by the New York State Senate Minority Leader (Tr. p. 127) and that he knew the Appellant (Tr. p. 128). The Appellant held the position of special assistant to the Minority Leader of the Senate and was also employed at New York Medical College (Tr. p. 129). The Appellant had been employed by the Senate Minority Leader since January 1975. (Tr. p. 130). The position of Supervisor did not exist (Tr. p. 130) and the job of counsel to the Minority Leader was held by Jerome Kretchmer. (Tr. p. 131).

JOYCE FRENCH was called as a witness by the Government.

She testified that she had been employed by the New York State Senate as a secretary since 1965 (Tr. p. 143) and that she had known the Appellant since 1973 or 1974. (Tr. p.

144). She had resided at 587 Broadway, Apt. 12c, Menands, N.Y. since 1975 and that nobody had the apartment prior to her since it was a new complex. (Tr. pp. 144-145). She testified that the information in Gov't. Exhibit 2 that Mr. Yasper lived at her apartment for four years was false. (Tr. p. 146). In January of 1977, the Appellant asked the witness whether or not he could use her mailing address and she stated that he could. (Tr. p. 148). Mail which looked like bills or bank statements addressed to Mr. Yasper did come to her address. (Tr. p. 148). During the winter of 1976 the Appellant stayed with her and her husband at least three times. (Tr. p. 150).

ROBERT MATUSIAK was called as a witness for the Government.

He testified that he was employed by the New York State Senate as the Chief financial officer and that he kept all of the official records, documents and health records for the New York State Senate. (Tr. p. 169). The witness further testified pursuant to personnel records of the Appellant's employment at the New York State Senate that the Appellant was never a supervisor and never held the title of supervisor or counsel (Tr. p. 177); that the Appellant never made a salary of \$23,000 or \$36,000 per year (Tr. p. 178); that the Appellant had commenced working with the Senate in January 1973 (Tr. p. 180); that the Appellant's social security number was not the same as the numbers given on Government's

Exhibits 1 through 3 (Tr. p. 181); and that the date of birth given of September 28, 1928 or September 28, 1932 was not the same.

On cross-examination, the witness testified that some Senators employ individuals but the salary may not be reflected on the official payroll (Tr. p. 190); and that the job titles are not classified so that each Senator is free to give the employee his title. (Tr. p. 195).

CARL J. MIONE was called as a witness for the Government.

The witness testified that he was an inspector for Diner's Club Credit Card Company and that he conducted investigations relative to fraud. (Tr. p. 196). In 1970, Diners Club received three applications for credit cards from an individual named respectively Charles A. Yasper (G. Exhibit 46); C.A. Yasper (G. Exhibit 47) and Curtis Yasper (G. Exhibit 48). (Tr. p. 199). Cards were issued pursuant to the applications and they were cancelled in 1971 for non-payment of charges with an unpaid balance of \$11,430.27. (Tr. p. 201).

Diners Club received two applications in 1975 from Casper A. Yasper (G 50 and 51). On both applications the applicant listed employment with the New York State Senate but gave different titles. (Tr. pp. 202-203). Cards were not issued pursuant to these applications. (Tr. p. 204).

Government's Exhibit 49 admitted into evidence was a verification of employment form returned by the New York State Senate purportedly signed on June 9, 1975 by Senator Vander L. Beatty. (Tr. p. 206).

ROBERT MATUSIAK was recalled as a witness for the Government and testified that he was familiar with Senator Vander Beatty's signature and the signature on G. 49 was not the signature of the Senator. (Tr. p. 216).

REGINALD A. AUSTIN was called as a witness by the Government.

The witness testified that he was employed by Chase Manhattan Bank as a special investigator with regards to fraud and theft of Bank Americard credit cards. (Tr. p. 217). G. 52, a Chase Manhattan Bank Americard application made out by C. Alex Yasper residing at 69 Tiemann Place, Apt. 8, New York, N.Y. 10025 and G. 53, a time saver credit card application by C.A. Yasper dated January 22, 1977 were admitted into evidence. (Tr. pp. 218-221). An investigation was conducted and based upon a bank loan application in the name of C. Alex Yasper, 587 Broadway, Apt. 12c, Menands, N.Y. a card was issued. (Tr. p. 224). The Appellant picked up the card upon issuance on April 11, 1977 (Tr. p. 227) and at the time Inspector DuPilka and other postal inspectors advised the Appellant of his constitutional rights. (Tr. p. 226).

CARMINE CENATIEMPO was called as a witness for the Government.

The witness testified that he had been employed at Manufacturers Hanover Trust Company in their personal loan department for 15 years. G 54 admitted in evidence was a personal loan application in the name of Casper A. Yasper residing at 880 Eighth Ave., N.Y.C. employed at New York Medical College, submitted on December 7, 1973 requesting \$2,376.00. (Tr. p. 241).

G 55 in evidence was a personal loan application to Manufacturers Hanover in the name of Cornelius Yasper residing at 2065 First Ave., N.Y., N.Y. employed at New York Medical College submitted February 8, 1974 for \$2,376.00. (Tr. p. 241). The loan request in G 54 was denied, but the loan request in G 55 was granted. (Tr. p. 241). On February 11, 1974, the Appellant came to the bank, picked up the check but never cashed it. (Tr. pp. 243-244). Prior to the granting of the loan application, the witness had asked the bank's credit committee to grant the loan (Tr. p. 242); prior to Mr. Yasper's arrival at the bank, the witness had informed Mr. John Campbell of the bank's security office and he was there when the Appellant arrived at the bank.

JEFFREY DUPILKA was called as a witness for the Government.

Prior to his testimony before the jury, the court

held a hearing as to the admissibility of statements of the Appellant. The witness testified that he was employed by the Government as a postal inspector. The witness further testified that on April 11, 1977 he advised the Appellant of his rights at Chase Manhattan Bank on 135 St. in N.Y.C. and placed him under arrest and handcuffed him and later took him to the U.S. Attorney's office where he was again advised of his rights. (Tr. p. 259). The Appellant stated when questioned about his social security number that he had fifty of them that will never be found out and that he was not certain of his birthdate. (Tr. p. 260). A statement was signed in the U.S. Attorney's office repeating the aforementioned.

Thereafter, Assistant U.S. Attorney Levites left the office and the witness engaged the Appellant in conversation. While waiting for his attorney, the witness stated that Yasper admitted that he had done "the two American Express in New York" but he would fight in court on "the Philadelphia application." No questions had allegedly been asked prior to this. (Tr. p. 264).

The Court did not allow in the spontaneous admission made after Appellant asked for his lawyer but allowed the other statement in evidence.

The witness repeated the same testimony before the jury without testifying to the alleged spontaneous

admission. (Tr. pp. 283-293).

PHILIP T. MORGAN was recalled as a witness for the Government.

The witness testified that he did not know why there was no post mark on G 3 in evidence. (Tr. p. 301).

DREW SOMERFORD was called as a witness for the Government.

The witness testified that he was employed as a document analyst for the U.S. Postal Inspection Service Laboratory. (Tr. p. 317). He testified that G 58 and 59 were exemplars of Mr. Yasper's handwriting and that when he compared these exemplars to the signature of Senator Vander Beatty in G 49, it was his conclusion that all samples were written by the same individual.

The Government rested after calling Mr. Somerford as a witness. Before the commencement of the defense's case and after hearing argument, the Court dismissed Count 4 of the indictment.

JOHN CALANDRA was called as a witness for the defense.

He testified that he was a member of the New York State Bar, that he was a Senator in the New York Senate and that he had known Casper Yasper since 1971. (Tr. p. 338). Mr. Yasper had worked for Senator Von Luther from 1971 to 1974 when Von Luther was defeated. (Tr. p. 339). In addition

Mr. Jasper had been employed by Senator Vander Beatty for a while and he was currently working for the minority leader, Senator Ohrenstein. (Tr. p. 339). The witness was aware of the fact that Jasper had spent some time in jail. (Tr. p. 340).

GUY VELELLA was called as a witness for the defense.

The witness testified that he was a lawyer and a New York State Assemblyman and that he knew Jasper. (Tr. p. 347). He stated that Jasper had been working with Senator Von Luther when he arrived in 1973 and that from 1973 to 1977 he was an employee of the New York Senate. (Tr. p. 348).

EMILIO CARRILLO testified as a witness for the defense.

The witness testified that he was director of personnel for New York Medical College and that Jasper was hired July 31, 1972 with the College. (Tr. p. 352). Originally his salary was \$15,000 per year and in 1977 it was \$20,382 per year. (Tr. p. 352). From February through June 1973, Jasper was given a leave of absence while he was incarcerated. (Tr. p. 353).

SIDNEY VON LUTHER was called as a witness for the defense.

He testified that he was not employed at the time of testimony since he was recuperating from a series of operations but had previously from 1970 to 1974 been a Senator

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from the 27th Senatorial District. (Tr. p. 371). Prior to his election to the Senate, he was vice president of the professional division Local 1199 of the Hospital Workers. (Tr. p. 371). He met Mr. Jasper shortly after his first campaign victory in 1970 and Mr. Jasper was employed by him as an administrative assistant in 1970 and 1971. (Tr. p. 377). Payroll records were not kept from the Senate Finance office, however (Tr. p. 377) at that time.

Jasper and Mrs. French were good friends prior to 1973 due to his and her relationship to the Senator's office. (Tr. p. 379).

Jasper and Senator Vander Beatty were close friends and the witness knows that Jasper was working for Senator Beatty in 1974 but does not know whether he was working for him thereafter since the witness left the Senate in 1974.

The witness also testified that it was common knowledge in the Senate that Mr. Jasper had done time in Danbury, Connecticut (Tr. p. 375) and that it was not unusual for aides to senators or assemblymen to sign for them. (Tr. p. 380).

The witness further testified that Mr. Jasper worked at New York Medical College (Tr. p. 373) as assistant to the president of the complex, Dr. Lawrence Slobody. (Tr. p. 374).

On cross-examination, the Senator testified that

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it was not unusual in the New York State Senate for aides to senators to hold themselves out as counsel (Tr. pp. 392-394) but to his knowledge, Mr. Yasper was never a legal counsel to a Senator. (Tr. p. 393).

PETER MATTI was called as a witness for the defendant.

The witness testified that he was employed as regional director of credit operations for American Express. (Tr. p. 409). The witness further testified that in determining whether or not to grant a card, they weigh many factors as to risk categories. (Tr. p. 411).

GEORGE WOLFF was called as a witness for the defendant.

He testified that he was the director of customer service for American Express and up until June 1977 he also had responsibility for new accounts. (Tr. p. 429). The new accounts section does utilize the last name and social security numbers to determine whether or not there has been a recent application within the last six months, but it must be a perfect computerized match. (Tr. p. 432).

On cross-examination, Government's Exhibit 54, an application for an American Express card by C.A. Yasper, 1249 Fifth Ave., N.Y., N.Y., born September 23, 1928, employed by New York Medical College dated July 1, 1977 was introduced into evidence.

Weston
Rase-Rite Bond

COTTON
Counsel for both sides thereafter summed up and the Court charged the jury on July 29, 1977 at 9:30 in the morning. During the course of the charge the Court referred to the material introduced under Rule 404(b) of the Federal Rules of Evidence.

In referring to intent the Court Stated:

"The knowledge and intent, the wilfullness of the defendant, may only be put into contention with the circumstances surrounding his acts and the inferences which you the jury may find may reasonably be drawn therefrom.

You may ask yourselves whether you think these transactions were normal or abnormal, were they unusual or usual; whether you think the background of the defendant made it likely or unlikely that he fully understood what he was doing; whether you think the defendant has a motive; whether you think he had a financial interest in doing what he did." (Tr. p. 514)

Further, in discussing specifically the exhibits introduced, the Court charged:

"There was a lot of testimony during the trial that didn't relate immediately to these credit card applications which are the subject of this trial." (Tr. p. 515)

Thereafter, the Court referred to the various credit card applications, the Chase Manhattan Bank Americard incident, the loan application at Manufacturers Hanover, the appellant's mail fraud conviction, and the prior conviction in State Court for the falsification of business records.

In reference to this smorgasbord of Rule 404(b)

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material, the Court stated:

"Now, all of these matters may be considered by you, not in determining the guilt or innocence of the defendant on these charges, but may be considered by you when you consider his knowledge and intent in making these applications which are the subject of this trial." (Tr. p. 516)

Counts one through three were submitted to the jury by the Court. The Court did not submit the Fourth count to the jury.

The jury retired to deliberate and returned a verdict of Guilty on counts One through Three of the indictment.

On September 21, 1977, the Court sentenced Mr. Yasper to a term of imprisonment of three years on each count, the sentences to run concurrently. (Tr. p. 551).

POINT

THE COURT IMPROPERLY ADMITTED EVIDENCE OF PRIOR SIMILAR ACTS PURSUANT TO RULE 404(b) OF THE FEDERAL RULES OF EVIDENCE AND DID NOT GIVE THE JURY SUFFICIENT LIMITING INSTRUCTIONS

Directly in issue on this appeal are the limits of Rules 403 and 404 of the Federal Rules of Evidence. More specifically, to what extent does Rule 403 limit the admissibility of evidence of prior similar acts?

Rule 403 of the Federal Rules of Evidence provides as follows:

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"Although relevant, evidence may be excluded of its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Rule 404 of the Federal Rules of Evidence provides:

"(a) Character Evidence Generally - Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion...(enumerated exceptions to the general rule not relevant herein)

(b) Other crimes, wrongs, or acts - Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."

It is interesting to note that Rule 403 went through a very noteworthy change prior to its passage. The Preliminary Draft of the Rule in 1969 drew a distinction between mandatory and discretionary exclusion of certain forms of evidence as follows:

"EXCLUSION MANDATORY.

Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.

(b) EXCLUSION DISCRETIONARY.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence."

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The Advisory Committee notes do not indicate why the mandatory vs. discretionary dichotomy was eliminated in the final draft. The notes simply say:

"Exclusion for risk of unfair prejudice, confusion of issues, misleading the jury or waste of time, all find ample support in the authorities. 'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."

As above-stated, Rule 403 directly limits Rule 404. The Advisory Committee noted in discussing Rule 404(b) that they anticipated that:

"The use of the discretionary word 'may' with respect to the admissibility of evidence of crimes, wrongs or acts is not intended to confer any arbitrary discretion on the trial judge. Rather it is anticipated that with respect to permissible uses for such evidence the trial judge may exclude it only on the basis of those considerations set forth in Rule 403 i.e. prejudice, confusion or waste of time."

It is clear then that the two sections are inextricably related to one another and tied together.

There is a danger in admitting evidence of other similar acts which must be confronted immediately. The chance that the jury will interpret this evidence as evidence of criminal disposition is always there. Where as herein the trier of fact is asked to sift through witness after witness testifying to alleged prior similar acts, it becomes a near certainty that the jury will turn the presumption of inno-

The statement of probability by the jury certainly squares with Rule 401 of the Federal Rules of Evidence, but does not square with Rule 403 or Michelson v. United States, 335 U.S. 469 (1948). In Michelson the Supreme Court stated:

U.S. v. Burkhart, 458 F.2d 201 (10th Cir 1972)

"First the accused is required to defend charges which are not described in the information or indictment. As a result he

is required to defend past indictments which he may have in the past answered and with respect to which he may have even served his sentence. Thus, he is in effect tried as a recidivist though such a charge is not part of the federal criminal code.

Secondly, although such evidence may have at least some relevance to the offense being tried, its predominant quality is to show up the defendant's character as a car thief or a bad check artist for example. Proof of defendant's sociopathic disposition is not a valid object. Showing that a man is naturally bad had never been under our system allowable. The defendant has a right to be tried on the truth of the specific charge contained in the indictment.

Third, an obvious truth is that once prior convictions are introduced, the trial is for all practical purposes completed and the guilty outcome follows as a mere formality. This is true regardless of the care and caution employed by the court in instructing the jury." See also Pinckney v. U.S. (by Skelly Wright, J.) 363 F.2d 696 (D.C. Circ. 1966); U.S. v. James, 208 F.2d 124 (2nd Cir. 1953)

It is clear, then, that if the "other similar acts" evidence is admitted to show prior disposition to commit the offense charged, it must be excluded. If, however, the reason for admitting it is delineated under one of the exceptions to Rule 404(b), it may still be excluded. As Judge Friendly succinctly stated in U.S. v. Kahner, 317 F.2d 459 (2nd Cir 1963) cert den 375 U.S. 836 (1963):

True, the trial judge should in the exercise of sound discretion, exclude evidence tending to show the commission of other crimes 'where the minute peg of relevancy will be entirely obscured

by the dirty linen hung upon it."

Under Rule 403, relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice. U.S. v. Catalano, 491 F.2d 268 (2nd Cir. 1974); confusion of issues or misleading the jury, Shepard v. U.S., 290 U.S. 96 (1933) and when the introduction of such evidence will waste time or cause undue delay, Hamling v. U.S., 410 U.S. 87 (1974).

In Shepard, for example, the Court reviewed a conviction obtained in a trial where an accusatory statement by the victim was introduced implicating the defendant. The Court (Cardozo, J.) refused to allow the statement as a dying declaration or to show the victim's state of mind. Justice Cardozo stated:

"It will do to say that the jury might accept the declarations for any light they cast upon the existence of a vital urge, and reject them to the extent that they charged the death to someone else. Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds...When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out." 290 U.S. at p. 104.

Turning to the instant case, the appellant points out that under Rule 404(b), the threshold question of relevance on the issue of intent was not established. Assuming for argument's sake, that relevance on the issue of intent was established, such evidence was unduly prejudicial

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and misleading under Rule 403.

It is clear that the Government must do more than simply assert that it wishes to present similar act testimony. It must indicate affirmatively the exception to the general rule under which it attempts to introduce such testimony and it must be a real and not speculative claim of relevance.

In U.S. v. DeCicco, 435 F.2d 478 (2nd Cir. 1970), the Court reversed a conviction of conspiracy to transport stolen goods in interstate commerce where evidence of prior sales of paintings was admitted against one co-conspirator. The Court, in rejecting the evidence as probative of intent, stated:

"The rule which, despite the general rule authorizes the admission into evidence of prior crimes similar in nature to the crime sought to be proved at trial authorizes it in order to prove knowledge, intent, or design. Therefore the evidence is compensatingly probative if the element of intent etc. is placed in issue in the case at trial, either by the nature of the facts sought to be proved by the prosecution or the nature of the facts sought to be established by the defense...In this case almost the entire defense was the attempted impeachment of the Government's principal witness, Paul Parness." 435 F.2d at 483.

In the instant case, the Government chose to put intent into issue during the course of the case. The appellant's attorney chose not to give an opening statement so the assumption may have been premature.

If this Court finds however, that prior similar

acts testimony would be relevant on the issue of intent, the Government would still have to justify the introduction into evidence of this virtual smorgasbord of prior similar acts.

Introduced into evidence in addition to prior credit card applications was a loan application to Manufacturers Hanover and a purported arrest for receiving a loan from Manufacturers Hanover; an arrest for receiving a Bank Americard; two prior convictions in State and Federal Court. To say that all of these various transactions and events is relevant on the single issue of intent stretches the credibility of the prosecution. When one gets into so many diverse areas allegedly on the issue of intent, it is clear that criminal disposition is being litigated in the name of intent.

Again, however, assuming that the issue of relevance is reached and answered in the affirmative, it must be found that the testimony and exhibits also meet the criteria enunciated under Rule 403.

Regardless of any protestation by the Government that the prior similar acts do not have the same prejudicial impact as the admission of a gun or the robbery of a supermarket in a Bank Robbery case, it is clear that the introduction of an arrest and two convictions has a quite direct and unduly prejudicial impact in a mail fraud case. Certainly, these items did not go towards proving intent but

merely indicated that the appellant was not virginal and perhaps had a recidivist mentality.

In addition, the testimony did have the effect of misleading and confusing the jury. Cautionary instructions were not given to the jury upon the receipt of potentially extraneous testimony and the jury could have been misled as to the manner in which this testimony was to be received.

The Court's charge did not clear up any possible confusion that ~~could have~~ been engendered by the testimony and exhibits. In fact, the charge may have added to the confusion.

For example, pointing to the background of the defendant as a consideration properly before the jury on the issue of intent flies in the face of Rule 404(a) and (b) which excludes character testimony as evidence of the defendant's acting in conformity therewith.

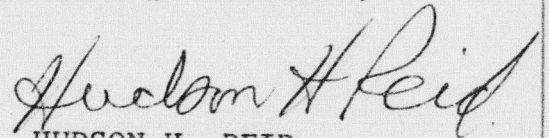
This portion of the charge was not clarified by the later assertion by the Court that the evidence of other similar acts could not be considered to determine guilt or innocence of those charges.

In conclusion, then, the appellant states that the evidence of other similar acts was improperly received and that insufficient cautionary instructions during trial and in the Court's charge were given.

CONCLUSION

The judgment of the District Court should be reversed and the case remanded for a new trial.

Respectfully submitted,

A handwritten signature in cursive script, reading "Hudson H. Reid". The signature is written in dark ink and is positioned above the typed name.

HUDSON H. REID
Carroll & Reid, Esqs.
Attorney for Appellant

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ROBERT B. FISKE JR.
MAR 13 1978
U. S. ATTORNEY
SO. DIST. OF N.Y.

